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IN THE

Supreme Court of the United States

OCTOBER TERM—1952

No. ...310..

EUGENE TRAMAGLINO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR ISSUANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETER L. F. SABBATINO,
Attorney for Petitioner.

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Statutes Involved.

Title 18, Section 371, U. S. C., dealing with conspiracy to violate the narcotic laws, reads, in part, as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Title 26, Section 2591 (a) U. S. C., dealing with the unlawful transfer of marihuana, reads:

> "It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 3230 and 3231, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary."

Title 21, Sections 173, 174, U. S. C., dealing with the unlawful sale of heroin, read, in part, as follows:

> "§173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.* It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe, but no crude opium may be imported or brought in for the

purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported."

"§174. *Same; penalty; evidence.* If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Title 26, Section 3238(b), U. S. C., defines Marihuana as follows:

"The term 'marihuana' means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixtures or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination."

Supreme Court of the United States

OCTOBER TERM—1952

No. .....

EUGENE TRAMAGLINO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR ISSUANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner Eugene Tramaglino respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, dated June 30, 1952, affirming the judgment of conviction rendered herein against the petitioner on June 26, 1951, by the United States District Court for the Southern District of New York.

Associate Justice Tom C. Clark, by an order dated July 29, 1952, duly extended petitioner's time to file a petition for the issuance of a writ of certiorari to and including August 29, 1952, the date of filing herein.

Jurisdiction

The original jurisdiction of the United States District Court in this case is based upon the statutes referred to in the indictment, viz., U. S. Code, Title 21, Sections 173 and 174 (Narcotic Drugs); Title 26, Section 2591a and 2600 (Marihuana); Title 18, Section 371 (Conspiracy).

The jurisdiction of this Court to issue a writ of certiorari to review the judgment of affirmance rendered by the Court of Appeals is invoked under U. S. Code, Title 28, Section 1254, and Rule 38 of the Rules of this Court.

Opinion Below

The opinion of Judge Jerome N. Frank, concurred in by Chief Judge Thomas W. Swan and Judge Augustus N. Hand, has not been officially reported, but is attached as an appendix to the record herein.

Summary Statement of Matter Involved

The judgment of the Court of Appeals sought to be reviewed affirmed a judgment of the United States District Court, which convicted the petitioner on the first three counts of the indictment: First Count, Conspiracy (U. S. Code, Title 18, Section 371); Second Count, unlawful transfer of marihuana, on or about September 30, 1950; Third Count, unlawful transfer of marihuana, on or about October 3, 1950 (both counts under U. S. Code, Title 26, Section 2591a).

The petitioner was tried before the Hon. Vincent L. Leibell, district judge, and a jury.

The petitioner was sentenced to serve five years on count one (conspiracy); five years and a fine of $2,000 on count two (the sentences of counts one and two to run

concurrently); and five years and a fine of $2,000 on count three (to run *consecutively* to the sentences on counts one and two), making a total sentence of ten years and a fine of $4,000.

The judgment was affirmed on appeal to the Court of Appeals, and petitioner now seeks a review in this Court.

The indictment named thirty-four defendants. At the trial the number of defendants was reduced to fifteen, by reason of either pleas or severance. The Court submitted to the jury the cases of fourteen of the fifteen defendants on trial. The jury found all defendants guilty on all counts, and, as against petitioner Tramaglino, guilty on Counts 1, 2, and 3.

Count 1, charging conspiracy, alleges that from May 1, 1950, to the time of filing the indictment on April 27, 1951, the petitioner Tramaglino, together with thirty-three co-defendants and two other co-conspirators, not indicted, conspired to violate Sections 173 and 174 of Title 21, and Section 2591(a) of Title 26 of the U. S. Code; and that the purpose of that conspiracy was the unlawful sale and transfer of marihuana, heroin and cocaine (8-10).*

The government offered proof that five persons, Zayas and his wife Ida Batista, Ralph Alvarez and his wife, and Vincent Conde, formed a partnership in May, 1950, for the sale of narcotics, cocaine and heroin (64, 139).

This partnership, formed in May, 1950, came to an end in September, 1950, because it was "broke", having no assets (374). Vincent Conde dropped out of the partnership in so far as marihuana was concerned. Alvarez continued the partnership with Joseph Zayas as to other narcotics (375). On September 17th or 18th, Alvarez contributed, in formation of this *new* partnership, and, there-

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* Pages in printed record.

fore, *new* conspiracy, an ounce of heroin; and Zayas put in $160 to buy marihuana (376).

The alleged sales by Tramaglino—disputed by the defense—were only two, one on or about September 30, 1950, and the other, on or about October 3, 1950, each being a sale of three pounds of marihuana (10-11).

The trial record shows that Tramaglino had no part in the conspiracy. No one testified that Tramaglino knew that he was selling marihuana to a partnership for the purpose of resale. The purchasers were themselves users of marihuana (135, 335).

The evidence of the government proved, not the general conspiracy alleged in the conspiracy count, but at least three different conspiracies of the same kind and nature, all executed by the same central group of Batista, Zayas, Alvarez and Conde. The proof also established a large number of other conspiracies between the central group and their distributors, in the disposal of the marihuana they bought. There was no connection between these conspiracies and the so-called conspiracy involving Tramaglino. There was no association, privity, or unity of purpose between these groups.

This proof of other conspiracies, where only one general conspiracy was charged in the indictment, was highly prejudicial to the petitioner.

Furthermore, Tramaglino had no stake in the business of the conspirators. He did not share in their profits. He had no joint interest to advance.

As to the two substantive counts (2 and 3) there was a fundamental infirmity in the proof because, as to Count 2, there was no expert or other competent proof that the substance sold by Tramaglino to Alvarez and Zayas was in fact marihuana, and as to Count 3, that it was that kind of marihuana prohibited by the statute.

The petitioner did not receive a fair trial because incompetent and prejudicial matter was injected into the case by proof that the defendant was guilty of prior offenses.

The matters involved herein present important questions in the administration of federal criminal justice. Where the government seeks to prosecute and convict many persons in one indictment on a charge of one general conspiracy, the issue should not be blurred by permitting the government to prove several conspiracies. Nor should the government be permitted to convict where the proof as to the corpus delicti—that the substance dealt in is in fact prohibited by law—is either totally lacking or wholly inadequate.

Questions Presented

1. Did the Court of Appeals err in affirming the judgment of conviction on Count one (Conspiracy) and in holding that the proof showed that petitioner Tramaglino was involved in one general conspiracy, where the facts showed several independent conspiracies?

2. Did the Court of Appeals err in affirming the judgment of conviction on Count 1 and in holding that Tramaglino, because of two isolated transactions, had a stake in the general conspiracy, where there was no proof that he knew that the alleged marihuana was for resale, and where he had no financial interest in the business of the purchaser?

3. Did the Court of Appeals err in affirming the judgment of conviction as to Count 2 where there was no competent proof that the article purchased was in fact marihuana?

4. Did the Court of Appeals err in affirming the judgment of conviction as to Count 3, where there was no proof that the marihuana sold was that kind of marihuana prohibited by statute?

5. Did the Court of Appeals err in affirming the judgment of conviction where admittedly prejudicial matter was presented before the jury—showing that petitioner was involved in offenses antedating the indictment?

Reasons for Issuance of Writ of Certiorari

1. The holding of the Court of Appeals for the Second Circuit, in affirming the judgment of conviction on the First Count, is in conflict with the reasoning of this Court in *Direct Sales Co., Inc.* v. *United States,* 319 U. S. 703, 712, footnote 8; *U. S.* v. *Kotteakos,* 328 U. S. 750; and in conflict with the reasoning of *Terry* v. *U. S.,* 7 F. 2d 28, 30 (9th Circuit), and *Oliver* v. *U. S.,* 121 F. 2d 245 (10th Cir.).

2. The holding of the Court of Appeals for the Second Circuit in affirming the judgment of conviction on the substantive counts is in conflict with the holding in *Schwyhart* v. *United States,* 82 F. 2d 725, 727 (8th Cir.).

Wherefore, petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a date certain to be therein named, the full and complete transcript of the proceedings of said Court herein, entitled *United States of America* v. *Eugene Tramaglino,* Docket No. 22364, and that the judgment of said Court be reviewed by this Court and for such other relief as to this Court may seem proper.

PETER L. F. SABBATINO,
233 Broadway,
New York 7, N. Y.

Dated this 29th day of August, 1952.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari, and that in my opinion it is well founded and the cause is one in which the petition should be granted.

PETER L. F. SABBATINO,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM—1952

No. .....

EUGENE TRAMAGLINO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion Below

The Court of Appeals of the Second Circuit unanimously affirmed the judgment of conviction, with an opinion, attached to the record, by Judge Jerome N. Frank, concurred in by Chief Judge Thomas W. Swan, and by Judge Augustus N. Hand.

Jurisdiction

The statement under which the jurisdiction of this Court is invoked, as well as the statement of the questions presented, and the factual matter relevant to this application, appear in the petition to which this brief is annexed.

Argument

Petitioner urges that the indictment alleged one general conspiracy but that the proof showed the existence of several unconnected conspiracies; that, even if there was only one general conspiracy, the proof showed that the petitioner Eugene Tramaglino was not connected therewith, had no stake in the conspiracy and had only two isolated and casual transactions with the conspirators; that there was no competent proof that the product sold by petitioner was in fact marihuana, nor was there competent proof that, if it was marihuana, that the marihuana sold was in fact the kind prohibited by the Federal Statute, and that incompetent prejudicial evidence of an alleged prior transaction of the petitioner was elicited by counsel for a co-defendant, and that the refusal of the trial court to declare a mistrial was an abuse of discretion which deprived the petitioner of a fair trial, and that, lastly, the government offered proof, shown by cross examination, to have been incompetent, and of a nature so prejudicial as to have deprived the petitioner of a fair trial.

POINT I

The proof failed to show that petitioner was a member of the general conspiracy. The conspiracy count should not have been submitted to the jury as against him. His motion to dismiss should have been granted.

Tramaglino moved unsuccessfully at the close of the government's case (551, 559) and at the close of the entire case (706, 710) to dismiss the conspiracy count. We respectfully contend that the failure to grant such motions constitutes reversible error.

Tramaglino was not a member of any conspiracy and, therefore, not guilty under Count 1 as a matter of law.

The hodge-podge development of facts at the trial showed that Tramaglino, accused of selling marihuana on only two occasions, was never any member of any conspiracy.

The government merely dragged into the net of the confessed conspirators, everybody who merely, without knowledge of the existence of a conspiracy, had any dealings with those conspirators, either as purchasers or sellers of drugs.

The proof showed that, although the conspiracy count alleges one continuous conspiracy, there was, in fact, more than one.

Ida Batista (named a co-conspirator but not a defendant) testified that she was living with defendant Joseph Zayas (59), and knew defendant Ralph Alvarez and his wife (178), and that they, together with defendant Vincent Conde, formed a "partnership" in May, 1950, for the sale of narcotics, cocaine and heroin (64, 88, 139).

Ida Batista and co-defendant Rodriquez delivered a pound of marihuana to co-defendant Pedro Rivera in September, 1950 (76); and, together with her co-partner "husband" Joseph Zayas, delivered another pound to him at 107th Street (76). On another occasion, Rivera came to her apartment for narcotics (77). The group made two or three sales to co-defendant Paula Le Brun (86, 87).

The group bought narcotics from Ramon de Ramon (75) and from Henry Soto, known as El Zorro (70), and also marihuana from defendants Republica Mejia and Peter Perez (91).

Ida Batista testified that Republica Mejia told her that Raymond Rosario was in Texas looking for marihuana in July (93). Batista's "husband" had bought the last quarter pound of marihuana in July (285), and then looked elsewhere for a supply. He met Marcel Courtier and the three of them—Batista, Zayas and Courtier—bought ten pounds from Soto (94).

The next source of supply was allegedly from Tramaglino. Ida Batista gave a muddled recital of facts concerning an alleged purchase from Tramaglino.* She testified that her husband Zayas and Alvarez said that, if they could get the money together, he, Alvarez, could get marihuana from Tramaglino (96). According to her, Alvarez *had* in his possession three pounds of marihuana that he *owed* Tramaglino, and that her husband said he could get up the money for it (96). In the beginning of September, Zayas and Alvarez spoke to Rodriquez and asked him *to get* the marihuana (96). The following night, Rodriquez brought the three pounds to her apartment (97). Two days later Tramaglino came to her house to get paid (97), and received $160 on account (97). She testified that a second purchase from Tramaglino was made a week before October 17 (101).

On cross examination, Ida Batista testified that she saw Tramaglino in her home one evening in September (184) "around the second half of September" (185), two or three days after they got the three pounds of marihuana from Alvarez through delivery by Rodriquez (188). Tramaglino was then given $160 on account (190).

Peter Perez, a defendant who pleaded guilty to counts 1, 6, 10 and 11 of the indictment (256, 262), testified that in May, 1950, he lived at, and was superintendent of, a house at 865 Columbus Avenue owned by Rosario and that he knew Ida Batista and Joseph Zayas (257); that they requested him to purchase four pounds of marihuana at $65 a pound (286). Het called Republica (Mejia), whom he was told to call by Rosario whenever he wanted marihuana (258). Republica brought the stuff and was introduced to Zayas and Batista (264). The next day Perez told Rosario he sold it to Zayas, Alvarez and Bubbles.

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*On the day of sentence Tramaglino denied "this marihuana business", and characterized it as "manufactured" (803).

Perez got a couple of more pounds at another time, and sold a pound of it, on September 1st, to an agent who was brought to him by Nestor Mojica (266, 267).

In the middle of August, Rosario came to Peter Perez and asked him to get five ounces of heroin (268). Perez then arranged a meeting between Alvarez and Rosario, and a sale was made the next day at $160 an ounce (268, 288).

Perez also made a sale of three pounds of marihuana at the end of May, 1950 (271); one pound to an agent named Jimmy about the first of September (272, 287); four pounds to Ida Batista about May 15; and three pounds to someone in Brooklyn named Big Joe, about June 3rd (272).

Ralph Alvarez admitted that he pleaded guilty to counts 1 and 11, which charged him with conspiracy; and the sale of five ounces of heroin to Rosario and Perez. He also admitted that he was convicted three times (303).

After talking with Ida Batista at his home, Alvarez, together with his wife, with Ida Zayas (Batista), Joseph Zayas and Vincent Conde, met at Luis' Bar & Grill at 110th Street and discussed the sale of narcotics and marihuana (305). After such meeting, Conde gave Zayas money to buy four or five pounds from Rosario (305).

The group bought from other sources heroin and cocaine which was diluted and capped, and good marihuana was stretched by mixing it with poor marihuana (306). They sold these drugs to defendants Ramon de Ramon (309), Pedro Rivera (310), Julio Belendez Rivera, known as Gilbert (934), Vincent Valdes, known as Canena (313), Paula Lebrun, Roy Rodate (314, 315), Emilio Gonzales Villoch (316), George Wormley (317), Carl Murphy, Jessie Johnson and Emilio Roca (319, 320).

Roca came to Alvarez in a bar and said he had a customer for two or three pounds of marihuana (320). Alvarez then stopped otuside and saw Jessie and two men, one

colored and one white (321). He told the two men to wait and he then went out with Roca, who had returned, and then made the transaction for one and one-quarter pounds of marihuana. This occurred during the first week in November (321).

On September 16th, or 17th, 1950, Perez came to Alvarez and said he had a sale of five ounces of heroin which he wanted for Rosario (322). Alvarez then went to Pete's house on Columbus Avenue and discussed the matter with Rosario (322). They arranged the sale for the next day as he had to get the stuff from a merchant seaman (322), who brought the heroin over and collected his money. Alvarez received one ounce for himself in this transaction (323).

Note now the formation of an independent conspiracy, different from the one of May, 1950, which then consisted of Ida Batista, Zayas, Alvarez and his wife, and Conde. Alvarez took this ounce to Zayas' house and told him he needed marihuana and that *they* should "get in partnership the marihuana, the heroin and everything" (324), and that Zayas would have to provide money to pay for the marihuana, as he, Alvarez, could only put in his ounce of heroin. They were short of marihuana, and, when Zayas asked Alvarez if he knew where it could be had, Alvarez replied he knew where he could get five pounds but would need cash. He told Zayas that Tramaglino could get five pounds (324).

Alvarez had a talk with Tramaglino at Luis' Bar & Grill, and told him he would send Louis Rodriquez, who was there with him, to get the marihuana (325).

Rodriquez and Tramaglino left together, and later Alvarez saw Rodriquez and was told he had gotten the stuff (326). The next day, Tramaglino came to Zayas' house, where Alvarez was also staying, and Ida Batista turned over $160 to Tramaglino. The balance of $110 was paid later on one or two occasions (326).

On another occasion, Alvarez sent Louis Rodriquez in Zayas' car with money to get five pounds of marihuana from Tramaglino but Rodriquez returned with only three pounds. This was all Alvarez could get with the money he sent over (327).

On cross examination, Alvarez admitted he used marihuana for himself, starting at the age of 19 years (335).

Alvarez further testified that he ended the partnership, formed in May 1950, because it was "broke" in September, having no assets (374); that Vincent Conde dropped out of the partnership in so far as marihuana was concerned, but he continued the partnership with Joseph Zayas as to other narcotics (375). On September 17th or 18th, Alvarez contributed, in formation of this new partnership, and therefore, new conspiracy, his ounce of heroin, and Zayas put in $160 to buy marihuana (376).

Alvarez said he had a talk with Tramaglino about a week after the seaman transaction of heroin. He specified the date as September 22 or 23 (380), and the location as Luis' Bar on 110th Street (381-382). He told Tramaglino that he needed marihuana, and Tramaglino said he must have cash (381-382). Alvarez called Rodriquez and told him to go out with Tramaglino (382). Alvarez saw Tramaglino again on September 24th in Zayas' house where he paid Tramaglino $160 on account (383-4). Two days later (September 26th), at the bar, Tramaglino was paid $40 or $50 (384). The next night (September 27th), Tramaglino was paid the balance (399).

Subsequently, Alvarez sent Rodriquez to Tramaglino for five pounds of marihuana. At first, Alvarez gave the date as around October 15 (400). Then he stated that it was one or two weeks after September 27 (401), and then later he testified that it was 9 or 10 days after September 27—about October 5th or 6th. He gave Rodriquez $270 and got only three pounds for it (402).

Louis Rodriquez testified that he was convicted three times for selling marihuana (425), and that he pleaded guilty to the first count charging conspiracy (427).

In the middle of September, Alvarez, after speaking with Tramaglino at Luis' Bar & Grill, told Rodriquez to go with Tramaglino and get some marihuana for him, Alvarez (428).

Three or four days later, Alvarez told Rodriquez to follow Tramaglino's car with Zayas' car. Tramaglino gave him another package. He brought the stuff to his room, and it was then taken to 320 East 49th Street. The stuff was then weighed and found to be only three pounds, whereas he was supposed to pick up five pounds (430). Rodriquez got the money from Alvarez and handed it over to Tramaglino, after he got the package (431).

On November 1st, 1950, Agents Hubbard and Jackson, with Bubbles, went to 865 Columbus Avenue, where Bubbles met Little Pete and told him he had two fellows who wanted a pound of marihuana. Little Pete did not want to meet Hubbard and Jackson, and they were told to go to 103rd Street and Central Park West. There, Little Pete met them, and told them he had to go downtown for the marihuana (456). At 10 o'clock that night they met Little Pete with a woman and received one pound from her, for which they paid $90 (457). They then took a cab to 96th Street and Central Park, where they joined Agent Ziegler, and turned the package over to him, after initialing it (457, 459). The woman was identified as defendant Republica Mejia (458).

Walter Morris testified that he was a narcotic agent; that he went with Agent Hubbard on October 5th, 1950, to Luis' Bar & Grill and there met Bubbles (477); that Bubbles summoned Ramon de Ramon, who was told that they wanted half an ounce of cocaine. Ramon de Ramon said that he sold only capsules, and they bought two capsules of heroin and two of cocaine (478).

On October 6th, Morris and Hubbard again met Bubbles at the Bar. He was talking to Jessie Johnson. Bubbles then called in Roca, and Hubbard asked for a half ounce of cocaine (480). The cocaine was given to him in Jessie's apartment. Hubbard gave the cocaine to Morris, and Morris turned it over to Agent Ziegler (481).

Motions to dismiss were then made by the several defendants (525-539 and 547-586) and such motions were denied as to all defendants (586), except Carl Murphy (572).

The record of the trial thus shows beyond peradventure of doubt that Tramaglino (assuming the sales were actually made by him), had no part in the conspiracy of Zayas, Alvarez, Batista and Conde and any others who associated with them in the disposition of the marihuana purchased from Tramaglino. Moreover, there is no vestige or shred of testimony that Tramaglino had any connection with any of the heroin or cocaine deals laid in the indictment.

At best, the evidence establishes that there were only two* isolated transactions, between Alvarez and Tramaglino, involving the sale of three pounds of marihuana on each occasion. Even Alvarez did not testify that Tramaglino knew he was buying the marihuana for the syndicate or combination, for Alvarez himself was a user of marihuana (335), as well as Ida Batista (135).

By the mere sale and purchase of an illegal article, the participants do not become co-conspirators.

In *U. S.* v. *Koch*, 113 Fed. (2nd) 982, at page 983, the Court said:

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* In the second paragraph of (1), in his opinion, Judge Frank writes that "Several sales were made by Tramaglino to Alvarez through one Rodriquez. Tramaglino was informed by Alvarez that the marihuana was for resale." There is no proof of more than two sales. There is no proof that Tramaglino was informed by Alvarez that the marihuana was for resale.

"The purchase of cocaine from Mauro was not enough to prove a conspiracy in which Mauro and the appellant participated. They had no agreement to advance any joint interest. The appellant bought at a stated price and was under no obligation to Mauro except to pay him that price. The purchase alone was insufficient to prove the appellant a conspirator with Mauro and those who were his co-conspirators. • • •

"It was necessary to the Government's case to show that the appellant was in some way knowingly associated in the unlawful common enterprise to import the drugs and dispose of them unlawfully."

There was not a scintilla of evidence from which the jury might infer that Tramaglino had any interest in the operations of the combination, or that he was in the least concerned with what happened with the marihuana allegedly sold by him to the syndicate.

There was absolutely no proof of "active incitement of purpose" or "stimulation" by Tramaglino of sales by his purchasers. Taking Alvarez at his word, he sought out Tramaglino to make two purchases, not that Tramaglino urged or incited him to make the purchases. Hence, under the criterion set up in *Direct Sales Co.* v. *U. S.*, 319 U. S. 703, 712, footnote 8, Tramaglino was not guilt of conspiracy and his motion to dismiss that count should have been granted.

U. S. v. *DiRe*, 2nd Cir. 159 F. 2d 818;
U. S. v. *Peoni*, 2nd Cir. 100 F. 2d 401;
U. S. v. *Falcone*, 2nd Cir. 109 F. 2d 579 Affd. 311 U. S. 205;
U. S. v. *Zeuli*, 2nd Cir. 137 F. 2d 845;
U. S. v. *Morei*, 6th Cir. 127 F. 2d 827, 831.

In the case of *Direct Sales Co., Inc.* v. *United States, supra*, this Court held that a seller's intent to further, promote, and cooperate in buyer's illegal use of narcotics is

not identical with mere knowledge that buyer purposes unlawful action, but cannot exist without such knowledge. This Court said, at page 712:

> "Concededly, not every instance of sale of restricted goods, harmful as are opiates, in which the seller knows the buyer intends to use them unlawfully, will support a charge of conspiracy."

The foregoing case contains the following important observations in footnote 8 on page 712:

> "This may be true, for instance, of single or casual transactions, not amounting to a course of business, regular, sustained and prolonged and involving nothing more on the seller's part than indifference to the buyer's illegal purpose and passive acquiescence in his desire to purchase, for whatever end. A considerable degree of carelessness coupled with casual transactions is tolerable outside the boundary of conspiracy. There may be also a fairly broad latitude of immunity for a more continuous course of sales, made either with strong suspicion of the buyer's wrongful use or with knowledge, but without stimulation or active incitement to purchase."

The defendant's exception to the Court's charge as to his stake in the conspiracy was well taken (779) (*U. S.* v. *Kelley*, 105 F. 2d 912).

POINT II

The conviction is void because the evidence adduced tended to establish two or more separate and distinct conspiracies, where the indictment alleged only one general conspiracy. This variance was prejudicial.

The indictment herein alleges in count one a single general conspiracy, but the proof shows that several different conspiracies existed.

If the sale of marihuana to Alvarez and Zayas be deemed to render the supplier a co-conspirator, then the several suppliers each entered into a separate conspiracy. The proof, if believed by the jury, tended to show that there were several suppliers of marihuana to Zayas. When one supplier could no longer furnish marihuana, resort was had to another. There was absolutely no connection between the various suppliers, or any proof that Tramaglino ever knew who in the past had supplied marihuana to his purchasers. Zayas originally bought from Perez and Republica Mejia (91). Later Zayas bought from Marcel Courtier and from Henry Soto (94). Only after Zayas was unable to obtain marihuana from other sources did the alleged transactions with Tramaglino take place. Certainly any conspiracy that Tramaglino might have engaged in with Alvarez and Zayas was a separate conspiracy from that of each of the other groups of suppliers of marihuana.

Moreover, the indictment joins marihuana and narcotics in the general conspiracy. Certainly Tramaglino had no part in or knowledge of the transactions relating to narcotics. These were distinctly separate conspiracies, if any. Even Batista and Alvarez dealt differently with marihuana than with heroin and cocaine, as Batista particularized: "No, marihuana was a different way of doing it" (192). Tramaglino was not a party to any conspiracy dealing with either heroin or cocaine, under the rationale of the case of *Kotteakos* v. *U. S.*, 328 U. S. 750, the line of cases represented by *U. S.* v. *Di Re*, 2nd Cir., 159 F. 2d 818, and the line of cases on conspiracy represented by *U. S.* v. *Crimmins*, 123, F. 2d 271, *U. S.* v. *Sherman*, 171 F. 2d 619, *U. S.* v. *Cordo*, 186 F. 2d 144.

As this Court noted in the *Kotteakos* case, *supra*, at page 755:

> "Thieves who dispose of their loot to a single receiver—a single 'fence'—do not by that fact alone become confederates."

Even the groups and individuals to whom Alvarez and Zayas sold marihuana or heroin or cocaine had no connection with each other, and each group, in its transactions with Alvarez and Zayas, constituted a separate conspiracy, since they did not share in the profits of Alvarez and Zayas (141), nor did the retailers share in each other's transactions or have any stake in the outcome of the conspiracy (*U. S.* v. *Falcone*, 2nd Cir. 109 F. 2d 579).

The 9th Circuit, in *Terry* v. *U. S.*, 7 F. 2d 28, 30, in reversing a conviction because *one conspiracy was charged and two proven*, quoted with approval from *U. S.* v. *McConnell* (D. C.) 285 F. 164, as follows:

> "If, however, the charge of conspiracy in the indictment is merely that all the defendants had a similar general purpose in view, and that each of four groups of persons were co-operating without any privity each with the other, and not towards the same common end, but toward separate ends similar in character, such a combination would not constitute a single conspiracy, but several conspiracies, which not only could not be joined in one count, but not even in one indictment."

This is precisely the situation in the case at bar and which renders void the conviction obtained herein.

Marcante v. *U. S.*, 10th Cir. 49 F. 2d 156;
Oliver v. *U. S.*, 10th Cir. 121 F. 2d 245;
Telman v. *U. S.*, 10th Cir. 67 F. 2d 716;
Parnell v. *U. S.*, 10th Cir. 64 F. 2d 324.

In *Oliver* v. *U. S.*, *supra*, at page 249,

> "When one large conspiracy is specifically charged, proof of different and disconnected smaller ones will not sustain conviction. Nor will proof of crime committed by one or more of the defendants, wholly apart from and without relation to others conspiring to do the thing forbidden, sustain conviction" and cases cited therein.

With the conspiracy count dismissed because Tramaglino was not a participant therein or because two or more conspiracies were shown, most of the evidence on the substantive crimes is likewise inadmissable. No one can say which evidence the jury considered, and which it had a right to consider. With such a state of the record, the judgment of conviction cannot stand.

POINT III

The proof that the article sold by the petitioner was in fact marihuana (Count 2), or that it was marihuana prohibited by statute (Count 3) was lacking.

A fundamental infirmity existed in the proof because there was no expert proof (as to Count 2) that the substance sold to Alvarez and Zayas by Tramaglino was in fact marihuana. On rebuttal, Alvarez did purport to tie up the marihuana sold to the government agent to that purchased from Tramaglino. But the substances allegedly purchased on September 30th (Count two) were never identified with sales to government agents.

Thus, no inference can be drawn from the testimony of the government chemist, Milos (488), relating to the nature of the government's Exhibit 3 (in attempting to sustain the third count), that necessarily what was sold by Tramaglino on the first sale, to sustain count two, was, in fact, marihuana.

Neither Alvarez, Rodriquez or Batista, the only conspirators who gave testimony involving Tramaglino, were qualified as marihuana experts, notwithstanding all their experience in handling it. There was no proof that any of them personally used *or tasted* that marihuana.* Under

* Judge Frank, in his opinion, writes in paragraph 5: "The 'corpus delicti' of the sale and purchase offenses was adequately proved by the testimony of the drug addicts based on their sight and taste that the stuff bought and sold was really heroin or marihuana." The Court below was in error. There was *no proof* that they tasted the marihuana—the only stuff that petitioner was charged with selling.

the rationale of *Schwyhart* v. *U. S.*, 82 F. 2d 725, 727, the conviction on the second count cannot stand for this reason alone. (See also, *Berry* v. *U. S.*, 275 Fed. 680.) In the *Schwyhart* case, *supra*, the Court said at page 727:

> "In criminal cases, conclusions of nonexpert witnesses embracing the essential elements to be proven cannot be said to constitute substantial evidence upon which a jury may be permitted to base a verdict of guilty."

Assuming that the pound and a quarter of the substance allegedly sold by Alvarez to the agent in October came from the purported three pounds sold to Alvarez by Tramaglino, which was identified by the chemist Milos as marihuana (Exh. 3, 489-90), there was no proof that the marihuana consisted of that portion of the plant which comes within the statutory definition of prohibited marihuana in Title 26, Sect. 3238(b) (556-557).

The burden of proof sections of the law do not relieve the government of the necessity of proving that the parts of the marihuana plant defined in the statute were the ones sold.

There are other parts of the plant and derivatives thereof which, if possessed or sold, do not constitute an offense. The burden of proof statute (Title 26, Sect. 2597) relieves the government only of negating exemptions set forth in sections 3230 to 3239 of the title. These exemptions are identified in section 3232 and relate to officials and employees of registered persons. Exemption is an attribute of a person's status and cannot relate to definitions of things.

The corpus delicti of the offense charged in count two of the indictment, namely, the marihuana alleged to have been sold by Tramaglino to Rodriquez for Alvarez, was not produced in court, nor was any explanation offered

for the government's omission to produce it. In the absence of such explanation, the offense must be deemed not to have been proved. (Compare, *U. S.* v. *Singer*, 43 F. Supp. 863.) No agents were involved in this transaction, as they were in *U. S.* v. *Adelman*, 107 F. 2d 497.

On all the grounds herein urged, neither count two nor count three may stand.

POINT IV

The trial court erred in denying petitioner's motion for a mistrial in consequence of the testimony by Alvarez that in 1947 he had purchased heroin from Tramaglino.

On cross examination by the attorney for the defendant Rosario, Alvarez was asked (349):

> "Q. Now, you stated that you were selling heroin as far back in 1947? A. Correct.
>
> Q. Where did you get the heroin at that time to sell? A. Well, I got it from Gene Tramaglino."

Later, after recess, Tramaglino moved for a mistrial which was denied and an exception noted (386-388, 389, 390).

Whether the attorney for the petitioner did not hear this testimony at the time, we do not know. The record is replete with complaints by counsel of the difficulty of hearing (59, 85, 115, 129, 130, 135, 149, 188, 425, 428, 447). It was apparently called to his attention by the defendant himself during recess.

When the motion was made, Mr. Cohn, the prosecutor, stated to the Court, referring to this testimony, that he "noticed that incident, too, and, of course, counsel did not object at that time. I looked around *fully expecting him to*

do so, but, as a matter of fact, he did not" (387). (Italics ours.)

The Court, in denying the motion for a mistrial as to Tramaglino, put it up squarely to counsel whether he should direct the jury to disregard that statement (388). Counsel, appreciating the inadequacy of a mere instruction to undo the harm, was constrained to take the lesser evil by not requesting any statement from the Court, for a repetition would have emphasized it (389).

In *People* v. *Robinson,* 273 N. Y. 442, 445-6, the New York State Court of Appeals, in unanimously reversing a conviction for larceny, wrote, in part, as follows:

> "Admonition to disregard evidence which is stricken out is easy to give and hard to follow. Judges trained by years of experience to base decision solely upon competent evidence contained in the record are not always completely confident of their ability to disregard and remain uninfluenced by information, or even impressions, conveyed to them dehors the record. The trial judge could not by admonition cause the jurors to forget what they had been told nor could he eradicate the impression that the defendant by objections was successfully excluding proof that the defendant habitually committed larceny. It is impossible to say that it did not influence the verdict.
>
> We have said recently: 'We must give to any defendant the right to be tried for the crime with which he is charged, and upon evidence proving or tending to prove that crime, uninfluenced by irrelevant facts and circumstances which tend to prejudice or mislead the jury. Issues must be left clear, not smothered or in a haze.' *People* v. *Posner,* 273 N. Y. 184, 190, 7 N. E. (2d) 93, 96, opinion by Crane, Ch. J. Without fault of the trial judge, through the impulsive or perverse statement of a witness, the defendant has been deprived of the right which we have said we must give

to any defendant. When that occurred there was no room for the exercise of discretion by the trial judge. In moving for a mistrial under these circumstances, the defendant was vindicating a right, not asking for a favor."

The damage had already been done. This disclosure of alleged narcotic activity by Tramaglino, antedating the dates in the indictment, was necessarily highly prejudicial to Tramaglino and deprived him of a fair trial. Any reasonable doubt that the jury might have entertained that this defendant sold marihuana in the fall of 1950 might well have been dissipated by this prejudicial answer, and knowledge that Tramaglino was engaged in previous serious narcotic traffic in 1947. This was clearly error (*Lovely* v. *U. S.*, 169 F. 2d 386).

While the prosecutor did not elicit this answer, the prejudice was nevertheless present and the motion to declare a mistrial as to this defendant should have been granted (*U. S.* v. *Modern Reed and Rattan Co.*, 159 Fed. 2d 656, 658).

Moreover, this Court held in *Bollenbach* v. *U. S.*, 326 U. S. 607, 614, "it may not be amiss to remind that the question is not whether guilt may be spelled out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in federal courts."

When facts prejudicial to a defendant reach the jury, it is the duty of the trial judge to withdraw a juror and grant a new trial (*Griffin* v. *U. S.*, 3rd Circ., 295 F. 437, 439; *Mattox* v. *U. S.*, 146 U. S. 140).

In the *Griffin* case, *supra*, at page 439, the Court said:

"It is the right of a defendant accused of crime to have nothing reach the mind of the jury concerning the case except strictly legal evidence admitted according to law, and if facts prejudicial to him reach the

jury otherwise, it is the duty of the trial judge to withdraw a juror and grant a new trial. *U. S.* v. *Ogden* (D. C.), 105 Fed. 371; *Mattox* v. *U. S.*, 146 U. S. 140 * * *."

The error was substantial and may not be disregarded (*Kotteakos* v. *U. S.*, 328 U. S. 750, 28 U. S. C. Sect. 391).

POINT V

The Court erred in denying petitioner's motion to strike out Alvarez's testimony that he had marihuana, allegedly obtained by him from Tramaglino, since before May, 1950.

On re-direct examination Alvarez first stated that, when he was arrested in November, 1950, some marihuana was found in his home, and that it was part of the marihuana he last purchased from Tramaglino; later, that it was marihuana he had had since before the last sale, and that it was taken away by the agents (422-423).

On re-cross examination, he said the marihuana found in his home was given to him *prior to the two occasions* when Louis (Rodriquez) came for it (423), and then said he had had this marihuana since *before* May, 1950,—at a time antedating the conspiracy.

Alvarez had pleaded guilty; there was, therefore, no necessity to show that he had marihuana in his premises when he was arrested. It was the duty of the prosecutor to learn from Alvarez, by a few simple questions in preparation for trial, that the marihuana found in his possession at the time of his arrest was marihuana he allegedly had from a purchase from Tramaglino antedating May, 1950, the earliest date specified in the indictment. The prosecutor, therefore, presented evidence, wittingly or unwittingly, that was not only incompetent, but so highly prejudicial as to have deprived defendant Tramaglino of a fair trial.

It was the duty of counsel for petitioner to cross-examine Alvarez to challenge his credibility. Counsel brought out the falsity of Alvarez's direct testimony—that the marihuana found upon his arrest was a part of his last, or next to the last purchase from Tramaglino, that is, the two transactions referred to in Counts 1 and 2.*

Counsel moved to strike out the testimony on the ground that it was without the period laid in the indictment. The motion was denied and an exception taken (424).

This was clearly erroneous and rendered the trial unfair and prejudicial to the defendant.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 29, 1952.

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* Judge Frank, in paragraph 5 of his opinion herein, writes as follows: "Alvarez testimony that he bought marihuana from Tramaglino before May, 1950, was elicited in deliberate questioning by Tramaglino's lawyer himself, and cannot now be cited as prejudicial error."

Judge Frank completely overlooked the fact, in his reasoning, that it was the prosecutor who, in the first instance, as pointed out, first elicited this testimony in a false light.